SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-482

J. R. CESENA,
Petitioner,

v.

THOMAS L. McQUAID, Trustee in Bankruptcy for
FEDERAL SHOPPING WAY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE NINTH CIRCUIT

I.

QUESTION PRESENTED FOR REVIEW

Did the trial court clearly abuse its discretion in refusing to grant petitioner J. R. Cissna's motion under Rule 60(b), Federal Rules of Civil Procedure, to vacate the judgment granted against Mr. Cissna in this cause?

II.

COURT RULES RELEVANT TO CASE NOT PROVIDED BY PETITIONER

Rule 60(b), Federal Rules of Civil Procedure:

> "**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Rule 77(d), Federal Rules of Civil Procedure:

"**(d) Notice of Orders or Judgments.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

III.

STATEMENT OF THE CASE

On November 13, 1967, a reorganization proceeding for Federal Shopping Way, Inc. was commenced pursuant to Chapter X of the Bankruptcy Act in the United States District Court for the Western District of Washington. On May 20, 1970, respondent Thomas L. McQuaid, trustee of Federal Shopping Way (hereafter referred to as "trustee") commenced an action against petitioner J. R. Cissna[1] and others pursuant to the District Court's plenary jurisdiction under Chapter X (Record at 1).

On April 12, 1971, extensive interrogatories were served by plaintiff upon defendant J. R. Cissna. Upon failure of Mr. Cissna to answer the interrogatories within the required time, written requests were made to Mr. Cissna's attorney for answers with no result (Record at 23). On August 4, 1971, a written request was made to Mr. Cissna's attorney for a conference of attorneys with regard to discovery (Record at 23). On September 3, 1971, another written request was made for answers to a conference, with no result (Record at 23).

On October 27, 1971, a motion was made for an order compelling discovery (Record at 22). On approximately

1. In keeping with the spirit of Rule 28(d), Fed. R. App. P., petitioner was referred to by name in trustee's lower court brief. Trustee will continue this practice in this brief.

November 10, 1971, the court entered an order directing J. R. Cissna to file and serve answers to the interrogatories within 15 days of that order (Record at 24).

On December 9, 1971, approximately two weeks after the deadline for filing and serving the answers had expired, plaintiffs moved for a judgment by default pursuant to Rule 37(b)(2), Federal Rules of Civil Procedure, for failure of defendant J. R. Cissna to comply with the November 3rd order (Record at 29).

An affidavit controverting this motion was filed by defendant Cissna (Record at 31) who personally argued in opposition to the motion (Record at 62). After hearing, the court took the matter under advisement and directed counsel to submit proposed orders. A form of judgment was submitted by plaintiff to the court in accordance with Rule 58, Federal Rules of Civil Procedure. This judgment was signed and entered on December 20, 1971 (Record at 62). On January 19, 1972, the time allowed under Rule 4, Federal Rules of Appellate Procedure, for filing a notice of appeal expired and on February 18, 1972, the time expired for seeking an extension of the time allowed for filing notice of appeal under Rule 4.

On December 13, 1972, Mr. Cissna moved pursuant to Rule 60(b), Federal Rules of Civil Procedure, to have the December 20, 1971 judgment vacated (Record at 64). The matter came on for hearing on December 15, 1972. At that hearing Mr. Cissna personally argued his motion as well as testified (Record at 76, 82); *infra* at 10, n. 2. On January 17, 1973, an order was entered by the Honorable W. D. Murray denying Mr. Cissna's motion to vacate the judgment (Record at 76). An appeal was taken from that

order to the United States Court of Appeals for the Ninth Circuit. On June 11, 1974; that court affirmed the decision of the trial court. A timely motion was filed by Mr. Cissna for a petition for rehearing and for a rehearing en banc. This motion was denied on July 25, 1974. Mr. Cissna then petitioned this court for certiorari.

IV.

ARGUMENT

1. The Trial Court's Decision Was Correct

A. *The Only Question for Review Is Whether the Trial Judge Abused His Discretion in Denying Mr. Cissna's 60(b) Motion for Relief from the Judgment*

As the statement of the case and the record indicate, the appeal which Mr. Cissna took to the United States Court of Appeals for the Ninth Circuit was from Judge Murray's order denying Mr. Cissna's motion under Rule 60(b), Federal Rules of Civil Procedure, to vacate a judgment against Mr. Cissna granted almost a year earlier. In his petition for a writ of certiorari, Mr. Cissna raises numerous questions and issues. However, it is clear that there is only one question which is relevant in reviewing a denial of relief under Rule 60(b).

It is established law that motions under Rule 60(b) provide for extraordinary relief which may be invoked only upon exceptional circumstances and the ruling of the trial court upon such motions may be set aside only upon a clear showing of abuse of discretion. Therefore the question for review would be, did the trial court clearly abuse its discretion? *Farmers Cooperative Elevator Ass'n Non-stock of Big Springs, Nebraska v. Strand*, 382 F.2d 224, 232, (8th Cir. 1967), *cert. denied* 389 U.S. 1014 (1967), *reh.*

denied 390 U.S. 913 (1968); *Martella v. Marine Cooks and Stewards Union, Seafarers Int'l Union of North America AFL-CIO*, 448 F.2d 729 (9th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

B. *The Record Is Devoid of Any Evidence Which Shows An Abuse of Discretion. On the Contrary, the Record Demonstrates That the Trial Court Correctly Exercised Its Discretion and That Therefore the Court of Appeals Correctly Affirmed the Trial Judge's Decision*

The essence of Mr. Cissna's argument to the trial court claiming relief from the judgment taken against him was that he was unaware of its entry and therefore did not take an appeal from that judgment (Record at 64-69). There is an assertion in the record that Mr. Frank Payne, Mr. Cissna's attorney, specifically inquired and was advised that the judgment had been entered (Record at 72). Therefore, Mr. Cissna's statement that neither he nor his attorney were informed was challenged and the trial judge may have chosen not to believe Mr. Cissna. Since no findings of fact were asked for by Mr. Cissna, there is no way of knowing whether this was the case. However, the trial court's decision is entitled to support from all reasonable presumptions from the record, *Cf. Seifert v. Solem*, 387 F.2d 925 (7th Cir. 1967), and the burden of asking for findings of fact was upon Mr. Cissna. *See Perrin v. Aluminum Co. of America*, 197 F.2d 254, 255, n. 1 (9th Cir. 1952).

Even assuming that Mr. Cissna's assertion that he was unaware of the judgment was true, this would not amount to grounds for relief under Rule 60(b). Mr. Cissna asserts that the trial court's clerk failed to comply with Rule 77(d), Federal Rules of Civil Procedure, which requires the clerk to serve notice of the entry of judgment by mail. However, the Rule goes on to state:

"Lack of notice of the entry by the clerk does not

> affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed . . ."

The purpose of this provision is to put an affirmative obligation on the defendant to inquire into the status of the proceedings. *See* 7 Moore, *Federal Practice* § 77.05, pp. 77-10-14 (1972). As the records of the Court of Appeals of the District Court indicate, Mr. Cissna is a member of the bar of both courts. As such he is bound to be familiar with the requirements of the Federal Rules of Civil Procedure and therefore cannot claim the ignorance of a layman.

Even, disregarding the requirements of Rule 77(d), the proceedings leading up to the entry of the default judgment should have alerted any person to inquire into whether a judgment was entered. The default judgment was entered pursuant to a motion for default judgment under Rule 37, Federal Rules of Civil Procedure (Record at 29). The motion was noted for argument and argument heard with Mr. Cissna personally participating in that argument (Record at 62). At the hearing, the court specifically requested forms of orders from both parties and took the matter under advisement (Record at 75). It would seem that any reasonable person would be put on notice by these circumstances to inquire into what subsequent action the trial court took. Mr. Cissna's claim that his lack of notice justifies relief under Rule 60(b) clearly has no substance. This is particularly the case where, as here, the party seeking relief himself contends that he went almost one year before finding out about the judgment and then only by accident (Record at 66). *See Long v. Emery*, 383 F.2d 392 (10th Cir. 1967).

2. This Case Should Not Be Reviewed By the Supreme Court

A. *The Question Presented for Review Is Particularly Inappropriate for Consideration By the Supreme Court*

Appropriate and relevant arguments supporting Mr. Cissna's contention that this court should grant certiorari would attempt to show that the trial court had clearly abused its discretion. To prove an abuse of discretion, the appellant Mr. Cissna would have to show that the motion was substantiated beyond doubt by adequate proof as established in the record and that therefore it was clear error on the trial judge's part in denying the motion. *See Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966).

Thus, review by this court of the trial judge's decision would require an analysis of the particular facts regarding the failure of Mr. Cissna to file an appeal and whether those facts clearly showed that the trial court abused its discretion in denying Mr. Cissna's 60(b) motion. The Supreme Court of the United States does not grant a writ of certiorari merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

The conclusion that this case is not an appropriate one for review by the Supreme Court is underscored by Justice Brennan, who stated:

> "But ordinarily an application by a district court of the rules of civil procedure when affirmed by the Court of Appeals will not be reviewed by this court. *This is particularly true where as here, the question is one that concerns the judgment of the district court*

> *in relation to a particular set of facts.*" [Emphasis added.]

Appalachian Power Co. v. American Institute of Certified Public Accountants, 4 L.Ed.2d 30, 32, 80 S. Ct. 16 (1959) (per Brennan, J., as Circuit Justice). Mr. Cissna has not presented any arguments as to why these principles should be departed from.

While the size of the judgment against which Mr. Cissna's motion under Rule 60(b) was directed makes denial of the motion of obvious concern to him, this is not a sufficient reason for this court to review the trial judge's decision. As Mr. Justice Frankfurther stated:

> "*Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties*, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuits courts of appeal.' . . .
>
> "This is not the place to review a conflict of evidence . . ." [Citations omitted] [Emphasis added]

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502-503 (1951).

B. *Even If This Court Desired to Consider the Question Presented for Review, It Should Not Do So Because the Record Is Incomplete. Mr. Cissna Failed to Comply With His Obligation for Establishing An Adequate Record for Review*

Rule 10(b), Federal Rules of Appellate Procedure, imposes upon the appellant the duty to include in the record a transcript of all evidence which supports his contention that a finding or conclusion is unsupported by the evidence or is contrary to the evidence. As indicated by its absence in the record, Mr. Cissna failed to provide any transcript

although he gave testimony at the 60(b) hearing.[2] Without having all the evidence relied upon by the trial court, it seems clear that this court cannot determine that the trial judge abused his discretion. *Hemming v. United States*, 409 F.2d 11 (5th Cir. 1969); *Springer v. Best*, 264 F.2d 24 (9th Cir. 1959).

C. *This Court Should Not Consider Mr. Cissna's Arguments Since These Were Not Urged Below for the Trial Court's Consideration*

Although it is difficult to tell what alleged errors of the trial court Mr. Cissna wishes this court to review, the two primary ones are apparently that the judgment awarded violated the due process clause of the Fifth Amendment and the excessive fine provision of the Eighth Amendment. Thus, Mr. Cissna apparently argues, the judgment is void and he is entitled to relief under subdivision (4) of Rule 60(b).

As the record demonstrates, none of these issues was raised for the trial court's consideration, either in regard to the proceeding which lead to the judgment or the proceeding pursuant to Rule 60(b). Neither does the motion make any mention of subdivision (4) of Rule 60(b). In reading Mr. Cissna's motion, it is apparent that he was relying on subdivisions (1), (3) and (6). Subdivision (4) was apparently an afterthought which was not raised until Mr. Cissna appealed the trial court's decision to the Court of Appeals. (Record at 64-69.)

2. As indicated in respondent's brief submitted to the Court of Appeals, the docket sheet (Record at 82) ambiguously states that Mr. Cissna made "statements" at the hearing on the 60(b) motion. Affidavits of respondent's trial attorney and the courtroom deputy clerk were submitted to clarify what occurred in the lower court. These showed that Mr. Cissna was sworn and made numerous factual assertions at the 60(b) hearing.

The only mention of any of these issues is the due process issue found in a statement in Mr. Cissna's affidavit in support of his motion where he in effect stated that he was *withdrawing* this issue from the trial court's consideration and reserving the right to bring an independent action later on that ground. (Record at 69.) A basic rule is that this court will not review an issue where it was not raised in the trial court. *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241 (1949); *United States v. Atkinson*, 297 U.S. 15 (1936). Therefore these issues should not now be considered by this court.

3. The Arguments Made By Mr. Cissna Are Irrelevant and Without Merit

A. *The Arguments Made By Mr. Cissna for Allowance of the Writ Are Not Relevant to the Question Presented for Review*

Rule 19(b), Supreme Court Rules, sets forth the considerations governing the decision of the Supreme Court as to whether to review a decision from a Court of Appeals. Five situations are specifically mentioned as to when the Supreme Court will grant a petition for certiorari. Mr. Cissna, in his reasons for granting the writ, has apparently advanced two of these—first, that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, to call for an exercise of [the Supreme Court's] power of supervision", and second, that the Court of Appeals "decided a federal question in a way in conflict with applicable decisions" of the Supreme Court.

In support of these assertions, Mr. Cissna argues that he was deprived of due process and an excessive fine was

imposed upon him in violation of the Fifth and Eighth Amendments to the United States Constitution. In addition, scattered throughout his statement of the case, Mr. Cissna seems to make some miscellaneous arguments.[3] These appear to be that he has a defense to the action in which the judgment was awarded and that he had reasons for not answering the interrogatories on a timely basis.[4] *See* Petition for Writ of Certiorari at pp. 7-9.

However, all of these arguments go to the merits of the judgment against which his motion for vacation of the judgment was directed. They do not go to the denial of the motion itself which would be the subject matter of any review. The review of a denial of relief under Rule 60(b) does not bring up the underlying judgment itself for review. 7 Moore, *Federal Practice*, ¶ 60.30[2], p. 423 (1972). *See Polites v. United States*, 364 U.S. 426 (1960). Nor can review of relief under Rule 60(b) be used as a substitute for an appeal from the judgment from which the relief was sought. *See Morse-Starrett Products Company v. Steccone*, 205 F.2d 244 (9th Cir. 1953); *Perrin v. Aluminum Company of America*, 197 F.2d 254 (9th Cir. 1952). Therefore, these arguments made by Mr. Cissna have no relevance to the question for review, and thus do not support the assertion that this court should review that question.

3. Indeed, Mr. Cissna's lack of clarity in making his arguments should result by itself in a denial of his petition. *See* Rule 23.1, Supreme Court Rules. Mr. Cissna, by his own assertion, is an attorney of forty years' experience and should not be allowed the leave in these matters that might be granted to a layman.

4. Mr. Cissna may also be attempting to argue that he had reasons for not taking an appeal in statements made on p. 9 of his Petition for Certiorari. However, this attempt, if it is that, is woefully inadequate. Trustee demonstrates the correctness of the trial court's decision elsewhere. *See* pp. 5-7, *infra*.

B. *Even If the Arguments Made in Mr. Cissna's Petition for a Writ of Certiorari Are Considered, They Are Not Supported by Authority*

1. Denial of due process and excessive fine

Mr. Cissna's main contentions in his petition for certiorari are that he was denied due process and had an excessive fine imposed upon him. He relies in large part on language from *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). *See* Petition for Writ of Certiorari at pp. 12-13. This quote mentions two earlier cases, *Hovey v. Elliott*, 167 U.S. 409 (1897) and *Hammond Packing Company v. Arkansas*, 212 U.S. 322 (1909), and indicates that the *Hovey* and *Hammond Packing* cases establish constitutional limitations upon the power of courts in granting default judgments for failure to comply with their process. However, the language quoted by appellant is incomplete. The court in *Rogers* went on to state that in the *Hammond Packing* case:

> ". . . [T]he Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The Hovey case was distinguished on the grounds that the defendant there was denied his right to defend 'as a mere punishment'; due process was found preserved in Hammond on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence '. . . was but an admission of the want of merit in the asserted defense.'" 212 U.S. at 350, 351.

Societe International v. Rogers, 357 U.S. 197, 209-10 (1958).

There is nothing in the record now before this court which demonstrates that the default judgment was grant-

ed as a mere punishment. On the contrary, the record shows that the judgment by default was granted based on the presumption that the refusal to produce material evidence was an admission of the want of merit of the asserted defense. While the default judgment itself does not expressly recite the reason it was granted, the record indicates that trustee argued for a default based on a want of merit of Mr. Cissna's defense, rather than on punitive grounds (Record at 25-28, 62).

In *Rogers* itself, the court overruled a dismissal under Rule 37(b) only after finding good faith efforts to comply with a production order in the face of prohibition to produce and a seizure of the records by the Swiss Government. As the record demonstrates, Mr. Cissna has not shown that he made any good faith attempts to answer the interrogatories within the time allowed. Nor has he shown any extraordinary circumstances such as existed in *Rogers* which prevented him from answering.

Mr. Cissna, in support of his argument that the Default Judgment was unconstitutional as an excessive fine under the Eighth Amendment of the United States Constitution, relies mainly on *McFarland v. Gregory*, 425 F.2d 443 (2d Cir. 1970). Mr. Cissna's reliance on this case is unfounded. In *McFarland*, the court overturned the award of a *penal sanction* of $7,114 for failure to provide a proper working environment for plaintiff's accountant, who was reviewing defendant's records pursuant to a court order. The court noted that the $7,000 figure was arrived at by the trial court at a proceeding of which defendant had no notice, based on testimony without the benefit of cross examination. As indicated earlier, the Default Judgment granted against Mr. Cissna did not involve a mere penalty. In this

case Mr. Cissna was granted a hearing, and, in fact, personally argued at that hearing (Record at 62). Therefore, reliance on the *McFarland* case is misplaced.

2. Defense to action

Mr. Cissna's supposed defense to the action is based on no more than unsupported assertions that the law does not support his liability to trustee. More particularly, Mr. Cissna, without reference to authority, makes reference to "a corporate director claim under a repealed statute." Petition for Certiorari at p. 8. He is apparently referring to the old Washington Corporations Act, RCW 23.01.080, upon which the complaint was based and which was in effect at the time the actions complained of took place, but repealed prior to the commencement of the action. His assertion is apparently that with the repeal of the Act any right of action under it was also abrogated. However, this assertion flies in the face of the opinion in *True's Oil Company v. Kenney*, 76 Wn.2d 130, 455 P.2d 954 (1969), where the court noted that the repealer to RCW 23.01.080 had an express savings clause for any action accrued or liability incurred prior to its appeal. 76 Wn.2d at 138, 455 P.2d at 960 (citing RCW 23A.44.145).

3. Reasons for not answering interrogatories

Mr. Cissna's suggestion that there was a good reason why he did not answer the interrogatories is without support in the record. Mr. Cissna's only explanation for failing to comply with the order of the lower court directing him to answer the interrogatories by a certain date was essentially that he was busy with other matters (Record at 68-69). This is hardly a good reason. Rule

6(d), Federal Rules of Civil Procedure, specifically lays out a method whereby a party for cause shown may seek an enlargement of any time requirement. As a member of the bar of the lower court, Mr. Cissna should have been aware of this rule, yet the record indicates no attempt to seek an extension of time to answer the interrogatories. On the contrary—the record indicates indifference on the part of Mr. Cissna to the whole matter even after the motion for default was made (Record at 23, 81-82) and after the default judgment was entered. Having sat on his rights, he cannot now be heard to complain.

V.

CONCLUSION

This is not an appropriate case for this court to review on certiorari. Besides the fact that Mr. Cissna's assertions are groundless, review would require an analysis and weighing of facts, which it is not a function of this court to undertake. Moreover, the record clearly demonstrates that the trial judge did not abuse his discretion in denying the motion to vacate the default judgment. Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

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